STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, *Governor*

PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

December 22, 2003

Agenda ID #3105
Ratesetting

TO: PARTIES OF RECORD IN APPLICATION 00-02-039

This is the draft decision of Administrative Law Judge (ALJ) Thomas. It will not appear on the Commission's agenda for at least 30 days after the date it is mailed. The Commission may act then, or it may postpone action until later.

When the Commission acts on the draft decision, it may adopt all or part of it as written, amend or modify it, or set it aside and prepare its own decision. Only when the Commission acts does the decision become binding on the parties.

Parties to the proceeding may file comments on the draft decision as provided in Article 19 of the Commission's "Rules of Practice and Procedure." These rules are accessible on the Commission's website at http://www.cpuc.ca.gov. Pursuant to Rule 77.3 opening comments shall not exceed 15 pages. Finally, comments must be served separately on the ALJ and the assigned Commissioner, and for that purpose I suggest hand delivery, overnight mail, or other expeditious method of service.

/s/ ANGELA K. MINKIN
Angela K. Minkin, Chief
Administrative Law Judge

ANG:jva

Attachment

Decision **DRAFT DECISION OF ALJ THOMAS (Mailed 12/22/2003)**

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Metromedia Fiber Network Services, Inc. (U-6030-C) for Modification of its Certificate of Public Convenience and Necessity to Comply with the California Environmental Quality Act.	Application 00-02-039 (Filed February 25, 2000)

OPINION IMPOSING PENALTY

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OPINION IMPOSING PENALTY

Summary

In this decision, we impose a $50,000 penalty on Metromedia Fiber Network Services, Inc. (MFNS) for commencing construction on a portion of its California fiber optic network in violation of Commission Rule 17.1 *et seq.*, Decision (D.) 97-06-107, and Instruction 4 to the "registration" form authorized in that decision.

We find MFNS was aware or should have been aware that its project had the potential to cause environmental impact. Before commencing construction, MFNS should have allowed the Commission the opportunity to conduct an environmental review of MFNS' plans.

Background

On July 24, 1998, the Commission issued D.98-07-108, granting MFNS a Certificate of Public Convenience and Necessity (CPCN) to provide interLATA and intraLATA telephone service in California.[1] MFNS used the Commission's "registration" process to obtain its CPCN.[2] This expedited process allowed nondominant interexchange carriers (NDIEC) to file a form "Application for Registration" with the Commission and receive permission to operate in

[1] California is divided into ten Local Access and Transport Areas (LATAs) of various sizes, each containing numerous local telephone exchanges. "InterLATA" describes services, revenues, and functions that relate to telecommunications originating in one LATA and terminating in another. "IntraLATA" describes services, revenues, and functions that relate to telecommunications originating and terminating within a single LATA.

[2] Application (A.) 98-06-034, filed June 17, 1998.

California from the Commission's Executive Director, rather than having to obtain permission from the full Commission.

Attached to the form MFNS filed was a set of Instructions. Instruction 4 stated that,

> Only facilities which meet the requirements for exemption from the California Environmental [Q]uality Act (CEQA) pursuant to Commission Rule of Practice and Procedure Section 17.1(h)(1)(A)(1.) may be included in a CPCN registration. Specifically, minor alterations in an existing structure such as installing a switch in an existing building (sic). *All other facilities will require a formal application.* (Emphasis added.)[3]

> Exhibit 5 to MFNS' registration application was a "Description of Services," noting that, "MFNS will construct fiber optic transmission facilities throughout the State of California."[4]

MFNS did not seek or obtain review under CEQA of its plans to build a significant fiber optic network project in the San Francisco Bay Area and the Los Angeles Basin (Project). Rather, despite the fact that its Project would require it to engage in significant construction, including trenching and boring throughout these regions, MFNS simply commenced its work in September 1998 with no analysis of the impact on the environment.

MFNS stopped work after being contacted by Commission staff in October 1999 and informed that CEQA review would be required before the Project could continue. The Commission issued a Stop Work Order on

[3] *Affidavit of Dennis E. Codlin,* dated Feb. 20, 2001, Exh. A.

[4] *Id.*

October 21, 1999. While the Commission staff allowed MFNS to continue with limited work on the Project, most work was stopped late in 1999.

After issuance of the Stop Work Order, the Commission's staff conducted environmental review of the Project, and ultimately proposed that the Commission approve a Mitigated Negative Declaration (MND) that would permit MFNS to resume work. Our order in D.00-09-039 approved the MND, lifted the Stop Work Order, and permitted work to resume provided that MFNS observed stringent mitigation measures designed to protect the environment.

We also set a second phase of this proceeding to consider whether we should impose sanctions or penalties on MFNS:

> We recognize that our Stop Work Order has effectively shut this project down for many months, with attendant financial loss to Applicant. We also recognize that applicant has taken steps to mitigate environmental damage. Nevertheless, we believe that further consideration must be given to whether this Commission should levy fines or other sanctions against Applicant and its officers.[5] Our concern is that carriers may not have adequate incentives to comply with the law if the only penalty they face for non-compliance is the possibility of delays in construction. These delays would have occurred in the early stages of the Project anyway if MFNS had complied with the law and submitted to environmental review and mitigation.

The Commission delegated to the assigned administrative law judge (ALJ) authority to issue a ruling commencing the penalty phase. The ALJ did so in two rulings, seeking briefing from MFNS on whether it had violated Commission

[5] *See, e.g., In Re Coral Communications,* D.99-08-017, 1999 Cal. PUC LEXIS 519.

Rules 1[6] or 17.1 *et seq.*,[7] Pub. Util. Code §§ 701-02 or 2107 *et seq.*, or D.97-06-107 or Instruction 4 of the Application for Registration as an NDIEC that D.97-06-107 authorized.[8]

MFNS filed briefs in response to the ALJ Rulings on February 21, 2001 and May 3, 2001.[9] It asserted that it had violated no law or ruling applicable to MFNS and that sanctions were not warranted. It waived its right to a hearing in three separate submissions.[10] We examine each of its arguments in turn below.

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[6] Rule 1 provides that,

> Any person who signs a pleading or brief, enters an appearance at a hearing, or transacts business with the Commission, by such act represents that he or she is authorized to do so and agrees to comply with the laws of this State; to maintain the respect due to the Commission, members of the Commission and its Administrative Law Judges; and never to mislead the Commission or its staff by an artifice or false statement of the law.

[7] Because Rule 17.1 is lengthy we do not reproduce it here. The rule is available on the Commission's website at www.cpuc.ca.gov. Rule 17.1 describes the Commission's process for complying with CEQA.

[8] *Administrative Law Judge's Ruling Commencing Phase Two of Proceeding,* dated January 3, 2001, and *Administrative Law Judge's Supplemental Ruling With Regard to Phase Two of Proceeding,* dated April 3, 2001 (collectively, ALJ Rulings).

[9] *Brief of Metromedia Fiber Network Services, Inc. in Response to January 3, 2001 ALJ Ruling,* filed Feb. 21, 2001 (MFNS Brief), *Supplemental Brief of Metromedia Fiber Network Services, Inc. in Response to ALJ Ruling of April 3, 2001,* filed May 3, 2001 (MFNS Supplemental Brief).

[10] Letter from Edward W. O'Neill to ALJ Thomas, dated Feb. 9, 2001; *Waiver of Right to Evidentiary Hearing*, filed Feb. 13, 2001; and *Additional Waiver of Right to Evidentiary Hearing,* filed May 3, 2001.

MFNS' Positions

MFNS contends that there was no clear Commission rule, order or decision in 1998 requiring environmental review of NDIEC CPCNs and that the Commission's practice at the time was not to conduct any such review. It cites several 1994-1995 Commission decisions in which the Commission approved CPCNs for NDIECs constructing fiber optic facilities without requiring or conducting any environmental review. MFNS contends Commission staff led its attorneys to believe no such review was required. It also notes that the Commission did not request that MFNS clarify its plans for construction, and indeed decided in D.98-07-108 that MFNS was qualified to use the registration process. Thus, MFNS contends, it had no advance warning that the Commission required environmental review.

MFNS contends that D.97-06-107, which implemented the registration process, did not put the company on notice that it was required to seek CEQA review. It notes that the decision states that,

> The [registration] instructions have been modified to clarify that facilities-based carriers which require CEQA review for the facilities may not use this [registration] process . . . .

MFNS acknowledges that this provision of D.97-06-107 might perhaps raise a question as to MFNS' eligibility for the registration process, but states that the foregoing language is not explained in the decision.

MFNS also claims that Instruction 4 to the registration form was not clear enough to put it on notice that it had to obtain CEQA review of its project. Instruction 4 provided that:

> Only facilities which meet the requirements for exemption from the CEQA pursuant to Commission Rule of Practice and Procedure 17.1(h)(1)(A)(1) may be included in a CPCN registration. Specifically, minor alterations in an existing structure such as installing a switch in an existing building (sic). All other facilities will require a formal application.

MFNS claims the only logical conclusion to be drawn from D.97-06-107 and Instruction 4 was that MFNS was qualified to use the registration process despite this language.

It claims alternatively that its project was exempt from CEQA either because there was no possibility that the activity in question might have a significant adverse effect on the environment, or because a specific exemption from CEQA[11] obviated the need for CEQA review. MFNS thus contends it should not be penalized.

MFNS also contends that even if the Commission were to find that MFNS committed a violation of a Commission rule, order or decision, it would be inequitable to impose a penalty since MFNS did not intentionally violate the law.

[11] *See* 14 Cal. Code of Regs. §§ 15260-15285

Discussion

1. Violation of Commission Rule 17.1, D.97-06-107 and Instruction 4

We find that MFNS violated Commission Rule 17.1, D.97-06-107, and Instruction 4 to the Commission's NDIEC registration form. MFNS claims that there was no clear Commission rule, order or decision in 1998 requiring environmental review of NDIEC CPCNs and that the Commission's practice at the time was not to conduct any such review. We disagree.

A. MFNS Knew It Was Ineligible to Use the Registration Process

Attached to the declaration of MFNS' Vice President, Legal Affairs and Assistant Secretary Dennis Codlin is the registration form MFNS submitted. It was this form that led the Commission to grant MFNS its CPCN in D.98-07-018, and on which MFNS in turn based its decision to commence construction. Attached to the registration form MFNS filed with the Commission was a set of instructions containing, in pertinent part, Instruction 4:

> Only facilities which meet the requirements for exemption from the CEQA pursuant to Commission Rule of Practice and Procedure 17.1 (h)(1)(A)(1) may be included in a CPCN registration. *Specifically, minor alterations in an existing structure such as installing a switch in an existing building (sic). All other facilities will require a formal application.* (Emphasis added.)

MFNS clearly was aware of this instruction given that it was attached to the registration application it filed. Moreover, the instruction was clear that only minor alterations in an existing structure were allowed as part of the registration process. MFNS nowhere claims that its comprehensive Project fits the "minor alterations" definition.

Moreover, when we established the registration practice in D.97-06-107, we made clear that, "The [registration] instructions have been modified to clarify that facilities-based carriers which require CEQA review for the facilities may not use this process."[12] MFNS implicitly acknowledges that this provision is problematic for its case when it states that, "there is no dispute regarding MFNS' eligibility for the registration process as defined by D.97-06-107, *except perhaps* as a result of the [requirement in D.97-06-107 that facilities-based carriers which require CEQA not use the registration process.]"[13]

B. Even Assuming, Arguendo, That MFNS Was Unaware of the Limits to the Registration Process, Ignorance of the Law is No Excuse

Even if MFNS or its representative were unaware of Commission orders and rules on the subject, they should be held to have had knowledge of them.[14] This result is consistent with the general rule of law that ignorance of the law is no excuse for violating it.

A party coming before the Commission should conform its behavior to what the law and rules require. It may not gain an advantage and avoid compliance with the law simply by asserting that it received conflicting advice from a Commission staff person. While we recognize that all Commission employees should be familiar with legal authority binding the Commission and

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[12] D.97-06-107, 1997 Cal. PUC LEXIS 535, *6-7.

[13] MFNS Supplemental Brief at 5.

[14] As we stated in D.97-01-002, "whether or not respondent read and understood D.91-02-034 and the referenced general orders, a passenger stage corporation is charged

Footnote continued on next page

those it regulates, it is possible that staff might err on occasion, especially when called upon to give an opinion on a new or untested question of procedure. For this reason, the Commission only speaks officially through its decisions.

C. MFNS' Project Was Not a Minor Alteration of Existing Facilities Exempt From CEQA Review

MFNS' project was not exempt from CEQA review. As of 1998, we had already issued several decisions interpreting the "minor alterations" language contained in Instruction 4, which derives from CEQA Guideline Section 15301. That Guideline is lengthy, but nowhere allows anything like new construction of an entire statewide fiber optic network. It is obvious from the restrictive nature of the phrase "minor alteration" that MFNS' statewide Project did not fall within its purview.

1. The Minor Alteration Exemption Was Narrow

Our decisions from 1998 and before on the "minor alteration" exemption made clear that the exemption was narrow. All of the fiber optic cases relying on that language are similar to D.96-10-071, which involved a lease of existing fibers already in place in an electric utility's system. Indeed, a Lexis search of every case during the period January 1, 1990 to June 1, 1998 involving fiber optic facilities and the "minor alteration" exemption reveals that all such decisions involved an applicant with existing fiber seeking to lease the fiber to third

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with knowledge of statutes and regulations governing its operations." 70 CPUC 2d 558, 564 (1997).

parties. No case involved a party seeking to lay a brand new fiber optic network through a broad swath of California.[15]

2. The Cases MFNS Cites Are Distinguishable

MFNS cites several cases that it claims interpret the authority of NDIECs to build fiber optic networks more broadly. However, those cases were decided in 1994 and 1995.[16] They predated D.97-06-107, in which we stated that, "The [registration] instructions have been modified to clarify that facilities-based carriers which require CEQA review for the facilities may not use this process." They also predated our adoption of Instruction 4, which contains the "minor alteration" language.

3. Instruction 4 Gave MFNS Adequate Notice of its Obligations

We find Instruction 4 was adequate to put MFNS on notice that a network of the size it intended to construct required analysis under CEQA and Commission Rule 17.1.

It is true that we explained in D.02-08-063, based on similar circumstances facing another company installing fiber optic cable, that Instruction 4 "appears to be in error in referring to only one Class A exemption [from CEQA] (Rule 17.1(h)(1)(A)(1)), instead of all nine exemptions contained in

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[15] The search was in the CA Public Utilities Commission Decisions database, and used the "natural language" search methodology, the search terms "minor alteration existing facilities CEQA fiber optic" and the date restriction 1/1/90 through 6/30/98.

[16] MFNS cites D.95-04-058, D.95-05-004, D.94-03-073, D.94-05-045, D.94-02-046 and D.94-04-001. MFNS Brief at 18 n.41.

Rule 17.1(h)(1)(A), as would appear to be the intent."[17] Nonetheless, MFNS was not excused from complying with Instruction 4 simply because the instruction did not include all Rule 17.1(h)(1)(A) exemptions.

In fact, it is equally possible that Instruction 4, which prescribes rules for telephone corporations, did not include many of the other exemptions in Rule 17.1(h)(1)(A) because they did not apply to telephone corporations seeking NDIEC status. Several of the other exemptions relate to railroads, not telephone corporations.[18]

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[17] The "exemption" Instruction 4 cites is actually an amalgam of 17.1(h)(1)(A)(1) and (2), which exempt:

> Restoration and repair of existing structures when they have deteriorated or are damaged, in order to meet current standards of public health and safety under the rules of the Commission or other public authority, where the damage is not substantial and did not result from environmental hazard[,] and
>
> The operation, repair, maintenance, or minor alteration of existing facilities used to convey or distribute electric power, natural gas, water, or other substance.

[18] "Alteration in railroad crossing protection" (17.1(h)(1)(A)(5); "Minor railroad crossing alterations as described in [other Commission materials]" (17.1(h)(1)(A)(6); "Installation of new railroad-highway signals or signs" (17.1(h)(1)(A)(7); "Abandonment, removal, or replacement of . . . railroad facilities . . . " (17.1(h)(1)(A)(8); and "Division requests . . . as to clearances and walkways" (17.1(h)(1)(A)(9). These exemptions are not applicable to telephone NDIECs.

The only two exemptions that perhaps should have been included in Instruction 4 are 17.1(h)(1)(A)(3) and (4), relating to "The maintenance of landscaping around utility facilities" and "The maintenance of native growth around utility facilities." However, even if those exemptions appeared in Instruction 4, they would not aid MFNS, whose project extended far beyond landscaping and maintenance of native growth.

Most importantly, Instruction 4 on its face put MFNS on notice that it was not authorized to commence wide-scale construction around the San Francisco Bay Area and the Project. At the very least, in reviewing Instruction 4, MFNS knew it could not use the registration process if it was not carrying out "minor alterations in an existing structure such as installing a switch in an existing building," as Instruction 4 stated on its face. In addition, Instruction 4 referred to Rule 17.1(h)(1)(A), which MFNS could or should have reviewed.

Thus, we find MFNS had adequate notice of its obligations.

D. By Its Violation of Rule 17.1, D.97-06-107 and Instruction 4, MFNS Frustrated the Commission's Ability to Comply With CEQA

MFNS should have filed an application that would enable the Commission to conduct a CEQA analysis of the project before MFNS commenced construction. Violations that frustrate the Commission's ability to comply with its CEQA obligations are serious. Compliance with all Commission requirements is "absolutely necessary to the proper functioning of the regulatory process," and "disregarding a statutory or Commission directive, regardless of

the effects on the public, will be accorded a high level of severity."[19] Thus, regardless of whether MFNS' actions caused actual harm to the environment or financial loss to any third party, they may still merit penalties if they violated a statutory or Commission directive.

MFNS violated Rule 17.1, D.97-06-107 and Instruction 4 by frustrating the Commission's objective of addressing the potential environmental impacts of a project before construction commences. Such prior notice is essential to safeguard the environment. If the Commission does not assess environmental impact until after construction begins, there is a risk of irreparable harm to the environment that no remediation or monetary sanction can cure. Thus, to the extent MFNS took action with the effect of delaying or forestalling the Commission's assessment of environmental impact under CEQA, MFNS violated Rule 17.1, D.97-06-107 and Instruction 4.

2. Penalties

Under Pub. Util. Code § 2107, the statutory range of Commission penalties is from $500 to $20,000 for each offense. Each day of violation is considered a separate violation.[20] We have set forth criteria for considering penalties in D.98-12-075, and we find those criteria illustrative here. Those criteria, and our assessment of MFNS' conduct in light of them, follow.

[19] D.98-12-075, *mimeo.*, at 37.

[20] Pub. Util. Code § 2108.

A. Physical Harm

According to D.98-12-075, the most severe violations are those that cause physical harm to people or property, with violations that threaten such harm closely following. MFNS' actions in engaging in construction without CEQA review threatened, but did not actually cause, environmental harm. MFNS asserts that this fact ends the inquiry.

We disagree. While there is no evidence of any actual harm to the environment, this criterion nonetheless recognizes the need for penalties even where actions threaten, but do not cause, harm. There is no indication that MFNS had environmental monitors or other experts on the job-site who could have prevented harm were it imminent. Thus, this case is distinguishable from D.01-10-001, where another carrier that commenced work without CEQA review had the United States Forest Service on hand to supervise its work.

Nonetheless, given that there is no evidence of harm to the environment, we find that this factor supports neither an increase nor a decrease in the size of penalty.

B. Economic Harm

According to D.98-12-075, the severity of a violation increases with (1) the level of costs imposed upon the victims of the violation, and (2) the unlawful benefits gained by the applicant. Generally, the greater of these two amounts will be used in setting the fine. The fact that economic harm may be hard to quantify does not diminish the severity of the offense or the need for sanctions.

There is no evidence of costs imposed on victims of the violation, but we find that MFNS gained benefits by completing its Project in advance of when it would have had it awaited Commission review. MFNS jumped the line ahead of other applicants who complied with CEQA's requirements. On balance, this factor neither supports nor undermines the need for a penalty.

C. Harm to the Regulatory Process

A high level of severity will be accorded to violations of statutory or Commission directives, including violations of reporting or compliance requirements. This is clearly a case in which MFNS failed to afford the Commission the opportunity, in advance, to carry out its obligations under CEQA.

By the same token, MFNS' witness, Mr. Codlin, pointed out that the company's attorney received unclear information from a Commission staff person:

> I am informed that in May-June 1998, Swidler associate Kevin Minsky had telephone conversations with a member of the Commission's Telecommunications Division, Joe McIlvain, concerning the Commission's licensing requirements and procedures for obtaining a certificate of public convenience and necessity ("CPCN") for the type of services MFNS intended to offer and for the construction that MFNS planned to undertake.

Mr. Codlin then stated that MFNS' lawyer advised him of three things: (1) that MFNS need not file an application for facilities-based local exchange service, (2) that MFNS could proceed with the registration process, and (3) that MFNS should indicate in its registration form what construction it intended to undertake. Mr. Codlin concluded that, "I am informed that [the Commission's] Mr. McIlvain concurred with this advice."[21]

Thus, while MFNS violated a Commission rule, there is also evidence that it may have received unclear information from a Commission staff person. Thus,

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[21] *Affidavit of Dennis E. Codlin,* dated Feb. 20, 2001, ¶ 8.

on balance, we find this factor to warrant neither an increase nor a decrease in penalties.

D. The Number and Scope of the Violations

Under D.98-12-075, a single violation is less severe than multiple offenses. A widespread violation that affects a large number of consumers is a more severe offense than one that is limited in scope. In D.02-08-063, a case similar to this one,[22] facts almost identical to this one, we imposed a penalty for each day during which unauthorized construction took place.

MFNS' construction lasted more than a year, from September 1998 until October 8, 1999.[23] Thus, the violation was ongoing, warranting an increase in MFNS' penalty.

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[22] There is evidence in D.02-08-063 that the applicant consulted with Commission staff about CEQA. D.02-08-063, *mimeo.*, at 3. Here in contrast, the subject of CEQA never came up in MFNS' conversations with Commission staff. *Affidavit of Charles William Cook*, dated February 20, 2001, ¶ 8. We do not find that this difference in the evidence justifies a higher fine for MFNS. The difference in the two cases could cut either way. If the applicant in the prior case, D.02-08-063, was aware of CEQA and proceeded despite this awareness, one could find it more capable than MFNS, which professes a complete lack of awareness of CEQA prior to October 1999. By the same token, one might find the prior applicant was more diligent in knowing the law than was MFNS. In our view, these differences cancel one another out. Therefore, we do not find that MFNS' conduct warrants a greater proportionate fine than that imposed in D.02-08-063. The only difference in the fines is attributable to the number of days of violation, with MFNS' violation (400 days) lasting almost twice as many days as that in D.02-08-063, as corrected by D.02-10-021 (218 days).

[23] *Affidavit of Charles William Cook, Jr.*, filed Feb. 20, 2001, ¶ 5 & Exh. A. This end date predates Commission issuance of its Stop Work Order on October 18, 1999 because MFNS received calls from the Commission's staff, the California Attorney General's office and the Native American Heritage Commission questioning MFNS' activities between October 4 and October 8, 1999.

E. The Applicant's Actions to Prevent a Violation

The next D.98-12-075 criterion provides that applicants are expected to take reasonable steps to ensure compliance with applicable laws and regulations. The applicant's past record of compliance may be considered in assessing any penalty. MFNS did not attempt to comply with CEQA, does not appear to have taken into consideration the language of Instruction 4 despite its awareness of the provision, and acknowledges that D.97-06-107 states that "The [registration] instructions have been modified to clarify that facilities-based carriers which require CEQA review for the facilities may not use this process." However, MFNS has no prior record of noncompliance before this Commission.

We find this criterion warrants an increase in the amount of the penalty.

F. The Applicant's Actions to Detect a Violation

According to D.98-12-075, applicants are expected diligently to monitor their activities. Deliberate, as opposed to inadvertent, wrongdoing will be considered an aggravating factor. The level and extent of management's involvement in, or tolerance of, the offense will be considered in determining the amount of any penalty. In this case, MFNS proceeded without CEQA authorization, but the evidence does not show that it acted with the intent to violate the law. We do not find that this factor warrants an increase or decrease in the penalty.

G. The Applicant's Actions to Disclose and Rectify a Violation

Applicants are expected promptly to bring a violation to the Commission's attention. What constitutes "prompt" will depend on circumstances. Steps taken by an applicant promptly and cooperatively to report and correct violations may be considered in assessing any penalty.

MFNS stopped work because it was contacted by the Commission and the Attorney General's office rather than doing so purely on its own initiative, a factor that militates against it. By the same token, MFNS disclosed in Exhibit 5 of its registration form that it would "construct fiber optic transmission facilities throughout the State of California." While one could debate whether this disclosure was sufficiently prominent, MFNS did not attempt to hide its intentions in Exhibit 5.

On balance, the mitigating and exacerbating facts related to this factor cancel one another out and warrant no change in the penalty.

H. Need for Deterrence

Fines should be set at a level that deters future violations. Effective deterrence requires that the Commission recognize the financial resources of the applicant in setting a fine. We may take official notice of the fact that MFNS has recently emerged from Chapter 11 bankruptcy proceedings. We do not have financial information from MFNS generated since it emerged from these proceedings. We will assume given MFNS' bankruptcy, however, that its financial position is no better than average, and that we need not impose a huge fine in order to accomplish deterrence.

As noted previously, under Pub. Util. Code § 2107, each violation carries a potential fine in the range of $500-$20,000 per violation. In the case of a "continuing violation," each day of violation is a separate offense.[24] MFNS' construction lasted from September 1998 until October 8, 1999, approximately

[24] Pub. Util. Code § 2108.

400 days. If we decided to impose maximum penalties for each day of construction, the penalty would be $8 million. At $500 per day, the penalty would be $200,000.

We do not believe such a large penalty is warranted. We note that in two Commission decisions imposing penalties for unauthorized fiber optic construction, we imposed penalties of $25,000[25] and $105,000.[26] We do not find that MFNS' conduct is more serious than that of the other applicants. It is similar to that identified in D.02-08-063.

Moreover, due to a large number of factors that either militate against a penalty, or are neutral to the determination, it is in our discretion to suspend a portion of the penalty. We find that the fairest outcome is to assess a similar penalty to the one we imposed in D.02-08-063, but to increase it based on the greater time period during which MFNS engaged in construction. In D.02-08-063, we found that the construction lasted 216 days. D.02-10-021, *mimeo.*, at 2.[27] Here, our best estimate is 400 days. Thus, we will double MFNS' penalty from the $25,000 we imposed on Pacific Fiber Link to $50,000. We will suspend the remaining $150,000 that we could impose at $500 per day of violation.

I. Constitutional Limitations on Excessive Fines

Under D.98-12-075, the Commission will adjust the size of fines to achieve the objective of deterrence, without becoming excessive, based on each

[25] D.02-08-063 (Pacific Fiber Link), as corrected in D.02-10-021.

[26] D.01-10-001 (Pacific Pipeline System LLC).

[27] D.02-10-021 corrected errors in D.02-08-063.

Applicant's financial resources. We have set the penalty with this principle in mind.

J. The Degree of Wrongdoing

In setting penalties, the Commission reviews facts that tend to mitigate the degree of wrongdoing as well as facts that exacerbate the wrongdoing. We have discussed these facts above and find that a penalty of $50,000 is fair. In this case the facts that mitigate and exacerbate the wrongdoing are the following:

Mitigating Facts:

- MFNS' disclosure, albeit not prominent, in Exhibit 5 to registration form.

Neutral Facts:

- Lack of actual environmental harm, balanced by lack of environmental monitors;
- Harm to the regulatory process by MFNS' unilateral decision that CEQA did not apply to its application, balanced by unclear information from Commission staff person;
- MFNS' lack of effort to prevent a violation and comply with CEQA, balanced by MFNS' prior clean record;
- Lack of intentional misconduct;
- MFNS' disclosure of its intent to build a fiber optic network in Exhibit 5 to its registration form, balanced by MFNS' failure to stop work on its own.

Exacerbating Fact:

- Benefits MFNS gained from early construction without CEQA review;
- Duration of violation.

K. The Public Interest

Under D.98-12-075, in all cases, the harm will be evaluated from the perspective of the public interest. In our view, it is in the public interest for applicants planning construction with potential environmental impact to proceed carefully, rather than assuming that CEQA does not apply. As we hold above, Rule 17.1, D.97-06-107 and Instruction 4 all pointed to the need for CEQA review. It is in the public interest for us to penalize MFNS to deter future violations.

L. The Role of Precedent

The Commission will consider (1) previous decisions that involve reasonably comparable factual circumstances, and (2) any substantial differences in outcome. We have fined two companies for similar action. It is appropriate that we impose a fine as well in this case.

Comments on Draft Decision

The draft decision of the ALJ in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 77.7 of the Rules of Practice and Procedure. Comments were filed on _____ and reply comments were filed on _____.

Assignment of Proceeding

Loretta M. Lynch is the Assigned Commissioner and Sarah R. Thomas is the assigned ALJ in this proceeding.

Findings of Fact

1. On July 24, 1998, the Commission issued D.98-07-108, granting MFNS a CPCN to provide interLATA and intraLATA telephone service in California.
2. MFNS used the Commission's "registration" process to obtain its CPCN.

3. Attached to the registration form MFNS filed was a set of Instructions. Instruction 4 stated that:

> Only facilities which meet the requirements for exemption from the California Environmental [Q]uality Act (CEQA) pursuant to Commission Rule of Practice and Procedure 17.1(h)(1)(A)(1.) may be included in a CPCN registration. Specifically, minor alterations in an existing structure such as installing a switch in an existing building (sic). *All other facilities will require a formal application.* (Emphasis added.)

4. MFNS was aware of Instruction 4 to its registration form.

5. Exhibit 5 to MFNS' registration application was a "Description of Services," noting that, "MFNS will construct fiber optic transmission facilities throughout the State of California."

6. MFNS did not seek or obtain review under CEQA of its plans to build a significant fiber optic network project in the San Francisco Bay Area and the Los Angeles Basin.

7. Despite the fact that its Project would require it to engage in significant construction, including trenching and boring throughout these regions, MFNS commenced its work with no analysis of the impact on the environment.

8. MFNS stopped work after being contacted by Commission staff in October 1999 and informed that CEQA review would be required before the Project could continue. The Commission issued a Stop Work Order on October 21, 1999. While the Commission staff allowed MFNS to continue with limited work on the Project, most work was stopped late in 1999.

9. MFNS' Project was not a minor alteration to an existing facility.

10. MFNS acknowledged that the provision of [D.97-06-107] which states, "The [registration] instructions have been modified to clarify that facilities-based

carriers which require CEQA review for the facilities may not use this process" might undermine its eligibility for the registration process.

11. A Commission staff person may have given MFNS' attorney unclear information about MFNS' eligibility to use the registration process.

12. MFNS nowhere claims that the construction it did prior to Commission imposition of the Stop Work Order fell within the exemption cited in Instruction 4. Nor does it claim that its construction fell within the other Rule 17.1 exemptions.

13. There is no indication MFNS had environmental monitors or other experts on the job-site who could have prevent harm were it imminent.

14. There is no evidence of any actual harm to the environment of which we are aware from MFNS' actions here.

15. MFNS proceeded without CEQA authorization, but the evidence does not show that it intentionally violated the law.

16. MFNS stopped work because it was contacted by the Commission and the Attorney General's office, rather than doing so purely on its own initiative.

17. We may take official notice of the fact that MFNS has recently emerged from Chapter 11 bankruptcy.

18. MFNS' construction lasted approximately 400 days from September 1998 until October 8, 1999, just before the Commission issued the Stop Work Order on October 21, 1999. If we decided to impose maximum penalties for each day of construction, the penalty would be $8 million dollars. At $500 per day, the penalty would be $200,000.

19. In two Commission decisions imposing penalties for unauthorized fiber optic construction, we imposed penalties of $25,000 and $105,000.

20. In this case the facts that mitigate and exacerbate the wrongdoing are the following:

Mitigating Facts:

- MFNS' disclosure, albeit not prominent, in Exhibit 5 to registration form.

Neutral Facts:

- Lack of actual environmental harm, balanced by lack of environmental monitors;
- Harm to the regulatory process by MFNS' unilateral decision that CEQA did not apply to its application, balanced by unclear information from Commission staff person;
- MFNS' lack of effort to prevent a violation and comply with CEQA, balanced by MFNS' prior clean record;
- Lack of intentional misconduct;
- MFNS' disclosure of its intent to build a fiber optic network in Exhibit 5 to its registration form, balanced by MFNS' failure to stop work on its own.

Exacerbating Fact:

- Benefits MFNS gained from early construction without CEQA review;
- Duration of violation.

Conclusions of Law

1. MFNS violated Commission Rule 17.1, D.97-06-107, and Instruction 4 to the Commission's NDIEC registration form.

2. Instruction 4 to the registration made clear that only minor alterations in an existing structure were allowed as part of the registration process.

3. D.97-06-107 stated that, "The [registration] instructions have been modified to clarify that facilities-based carriers which require CEQA review for the facilities may not use this process."

4. Even if MFNS or its representative were unaware of Commission orders and rules on the subject, they should be held to have had knowledge of them.

5. Ignorance of the law is no excuse for violating it.

6. A party coming before the Commission should conform its behavior to what the law and rules require. It may not gain an advantage and avoid compliance with the law simply by asserting that it received conflicting advice from a Commission staff person. While all Commission employees should be familiar with legal authority binding the Commission and those it regulates, staff may err on occasion, especially when called upon to give an opinion on a new or untested question of procedure. For this reason, the Commission only speaks officially through its decisions.

7. MFNS' project was not exempt from CEQA review.

8. CEQA Guideline Section 15301 is lengthy, but nowhere allows anything like new construction of an entire statewide fiber optic network.

9. It was obvious from the restrictive nature of the phrase "minor alteration" that MFNS' statewide Project did not fall within its purview.

10. As of 1998, we had already issued several decisions interpreting the "minor alterations" language contained in Instruction 4. Our decisions from 1998 and before on the "minor alteration" exemption made clear that the exemption was narrow. All of the fiber optic cases relying on that language are similar to D.96-10-071, which involved a lease of existing fibers already in place in an electric utility's system.

11. A Lexis search of every case during the period January 1, 1990 to June 1, 1998 involving fiber optic facilities and the "minor alteration" exemption reveals that all such decisions involved an applicant with existing fiber seeking to lease

the fiber to third parties. No case involved a party seeking to lay a brand new fiber optic network through a broad swath of California.

12. The cases MFNS cites that it claims interpret the authority of NDIECs to build fiber optic networks broadly were decided in 1994 and 1995. They predated D.97-06-107, in which we stated that, "The [registration] instructions have been modified to clarify that facilities-based carriers which require CEQA review for the facilities may not use this process." They also predated our adoption of Instruction 4, which contains the "minor alteration" language.

13. Instruction 4 was adequate to put MFNS on notice that a network of the size it intended to construct required analysis under CEQA and Commission Rule 17.1.

14. MFNS was not excused from complying with Instruction 4 simply because the instruction did not include all Rule 17.1(h)(1)(A) exemptions.

15. The only two exemptions that perhaps should have been included in Instruction 4 are 17.1(h)(1)(A)(3) and (4), relating to "The maintenance of landscaping around utility facilities" and "The maintenance of native growth around utility facilities." However, even if those exemptions appeared in Instruction 4, they would not aid MFNS, whose project extended far beyond landscaping and maintenance of native growth.

16. At the very least, in reviewing Instruction 4, MFNS knew it could not use the registration process if it was not carrying out "minor alterations in an existing structure such as installing a switch in an existing building," as Instruction 4 stated on its face.

17. Instruction 4 referred to Rule 17.1(h)(1)(A), which MFNS could or should have reviewed. MFNS in reviewing the instruction was on notice that there were limits to the registration process.

18. Violations that frustrate the Commission's ability to comply with its CEQA obligations are serious. Compliance with all Commission requirements is "absolutely necessary to the proper functioning of the regulatory process," and "disregarding a statutory or Commission directive, regardless of the effects on the public, will be accorded a high level of severity."

19. Regardless of whether MFNS' actions caused actual harm to the environment or financial loss to any third party, they may still merit penalties if they violated a statutory or Commission directive.

20. MFNS violated Rule 17.1, D.97-06-107 and Instruction 4 by frustrating the Commission's objective of addressing the potential environmental impacts of a project before construction commences. Such prior notice is essential to safeguard the environment.

21. If the Commission does not assess environmental impact until after construction begins, there is a risk of irreparable harm to the environment which no remediation or monetary sanction can cure. Thus to the extent a party takes action that has the effect of delaying the Commission's assessment of environmental impact under CEQA, the party violates Rule 17.1, D.97-06-107 and Instruction 4.

22. Under Pub. Util. Code § 2107, the statutory range of Commission penalties is from $500 to $20,000 for each offense. Each day of violation is considered a separate violation.

23. According to D.98-12-075, the most severe violations are those that cause physical harm to people or property, with violations that threaten such harm closely following. MFNS' actions in engaging in construction without CEQA review threatened, but did not actually cause, environmental harm.

24. This case is distinguishable from D.01-10-001, where another carrier that commenced work without CEQA review had the United States Forest Service on hand to supervise its work.

25. We can impose penalties where a party threatens but does actually cause environmental harm.

26. MFNS gained competitive benefits by completing its Project in advance of when it would have had it awaited Commission review. MFNS jumped the line ahead of other applicants who complied with CEQA's requirements.

27. MFNS committed a violation for each day of construction pursuant to Pub. Util. Code §§ 2107 and 2108.

28. MFNS did not take steps to prevent a violation of Commission rules and other authority: it did not attempt to comply with CEQA, does not appear to have taken into consideration the language of Instruction 4 despite its awareness of the provision, and acknowledges that D.97-06-107 states that "The [registration] instructions have been modified to clarify that facilities-based carriers which require CEQA review for the facilities may not use this process."

29. We should impose a penalty of $200,000 on MFNS in this case.

30. We should suspend $150,000 of the penalty in view of the number of mitigating or neutral facts present here, and require MFNS to pay a net penalty of $50,000.

31. A net penalty of $50,000 is consistent with our penalty in D.02-08-063.

32. It is in the public interest for applicants planning construction with potential environmental impact to proceed carefully, rather than assuming that CEQA does not apply.

33. It is in the public interest for us to penalize MFNS for failing to comply with Commission Rule 17.1, D.97-06-107 and Instruction 4 and to deter future violations.

O R D E R

IT IS ORDERED that:

1. Metromedia Fiber Network Services, Inc. (MFNS) violated Commission Rule 17.1, Decision (D.) 97-06-107, and Instruction 4 to the Commission's non-dominant interexchange carrier registration form.

2. MFNS shall be assessed a penalty of $200,000, with $150,000 suspended due to the mitigating and neutral facts in the record. MFNS shall therefore be penalized a net amount of $50,000, payable to the General Fund of the State of California within 30 days of the effective date of this order.

3. Upon making such payment, MFNS shall file an advice letter with the Commission's Telecommunications Division attaching a cancelled check or other proof of satisfaction of the penalty obligation we impose in this decision.

4. This proceeding is closed.

This order is effective today.

Dated _____, at San Francisco, California.